

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MERLE E. LONG**

Claimant

VS.

**ENVISION, INC.**

Respondent

AND

**ACCIDENT FUND NATIONAL INSURANCE**

Insurance Carrier

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Docket No. 1,059,008

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) appealed the October 15, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 1, 2013, preliminary hearing; the transcript of the May 14, 2013, preliminary hearing and exhibits thereto; the July 9, 2013, independent medical examination report by Dr. David W. Hufford; and all pleadings contained in the administrative file.

**ISSUES**

Claimant alleges he slipped and fell at work on October 6, 2011, hitting his head on a metal bar and getting a splinter in his right knee. Claimant asserts that a few days after the accident, the splinter caused his right knee to become infected and swollen, which in turn caused him to fall at home on November 19, 2011. Claimant went to the hospital on November 20, 2011, and underwent surgery to repair a right femoral neck fracture. It is claimant's position the right femoral neck fracture was the natural and probable consequence of the right knee injury he sustained while working for respondent. Respondent argues claimant's right femoral neck fracture did not arise out of and in the course of claimant's employment.

This is the second time this claim has been before the Board. On May 17, 2013, ALJ Klein entered a preliminary hearing Order and made certain findings. ALJ Klein found that as a result of claimant's accident he got a splinter in his right knee that became infected. The ALJ found claimant's infected right knee caused him to fall at home on November 19, 2011. The ALJ ordered claimant undergo an independent medical evaluation by Dr. David W. Hufford, which claimant did on July 9, 2013. The ALJ requested the IME "for a determination of whether or not either of claimant's falls, the October 6<sup>th</sup> or November 19<sup>th</sup> 2011 as a result of his infection is the prevailing factor in claimant's need for hip surgery."<sup>1</sup> Neither party appealed that part of the preliminary hearing Order wherein the ALJ ordered claimant undergo an IME with Dr. Hufford.

A short preliminary hearing was held on October 1, 2013, wherein the parties presented no additional evidence. In an October 15, 2013, preliminary hearing Order, ALJ Klein impliedly found claimant's right femoral neck fracture arose out of and in the course of his employment with respondent. The ALJ found the November 19, 2011, fall, which was a natural and probable consequence of claimant's original accident at work, was the prevailing factor causing his need for medical treatment of the right hip. The ALJ ordered payment of claimant's medical expenses with Dr. Anthony G. Pollock, authorized additional treatment by Dr. Pollock and ordered temporary disability benefits. Respondent appeals.

The issue before the Board is: did claimant sustain a right femoral neck fracture by accident arising out of and in the course of his employment with respondent?

#### **FINDINGS OF FACT**

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

This Board Member incorporates by reference the findings of fact contained in the Board's August 8, 2013, Order.

In the May 17, 2013, preliminary hearing Order, ALJ Klein found:

The court makes the following preliminary findings. The claimant sustained a personal injury by accident, arising out of and in the course of his employment on October 6, 2011. The court finds that as a result of that accident, the claimant got a splinter in his knee that became infected. The court further finds that the infection caused the fall at home on November 19, 2011. Therefore, the court finds that the head injury, and the infection from the fall on October 6, 2011 are compensable injuries. What the court is not clear about, in spite of the opinion letter from

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<sup>1</sup> ALJ Order (May 17, 2013) at 2.

Dr. Koehn, is whether or not the claimant's second fall on November 19<sup>th</sup> 2011 is the prevailing factor in the claimant's need for surgery from Dr. Pollock.<sup>2</sup>

Respondent appealed to the Board, which affirmed the May 17, 2013, preliminary hearing Order. The Board Member who issued the Board's Order stated:

Dr. Koehn's opinion that claimant's October 6, 2011, fall at work was the prevailing factor causing his right lower extremity injury is uncontroverted by any other medical provider. Little, if any, evidence was presented to show that claimant's right knee injury was caused by anything other than the fall at work. Accordingly, this Board Member finds that claimant's October 6, 2011, fall at work was the prevailing factor causing his right knee injury.<sup>3</sup>

Dr. Hufford examined claimant on July 9, 2013, but was never deposed. The doctor's report states:

He [claimant] states that throughout the time following the work-related fall of October 6, 2011 he had significant pain throughout his entire right lower extremity. He describes specific pain in the right hip during this time with impaired ambulation causing him to limp and favor the right leg much of the time even while standing in place. He eventually saw his primary care physician, Dr. Koehn, on November 10, 2011. At that time the possibility of an occult right hip fracture was suspected and x-rays were recommended. He then states that while working on November 16 in his usual job he did quite a bit of activity which required him to kneel and squat and that the pain in his right hip further increased to the point where he had difficulty walking and was placed in a wheelchair while at work. This incident is referred to specifically in the joint letter which accompanies the records for this examination. On awakening on the morning of November 17, 2011 his pain was so severe that he did not feel he could ambulate and was taken to the emergency room at St. Francis where the medical record indicates a contemporaneous complaint of right hip pain with x-rays of the pelvis and right femur obtained. The radiologist's interpretation of those x-rays note arthritis of the right hip and a deformity consistent with an old, healed hip fracture. On or about the morning of November 19, 2011 he was getting out of bed and states that he felt unsteady and twisted and fell causing increasing pain in the right hip. He was unable to ambulate again and EMS was called on November 20, 2011 where he was transported to St. Francis. Evaluation in the emergency room revealed a non-displaced fracture of the surgical neck of the right femur. . . .<sup>4</sup>

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<sup>2</sup> ALJ Order (May 17, 2013) at 2.

<sup>3</sup> *Long v. Envision, Inc.*, No. 1,059,008, 2013 WL 4779982 (Kan. WCAB Aug. 8, 2013).

<sup>4</sup> Hufford IME Report at 1-2.

Dr. Hufford's impression was: "Work-related fall with subsequent right hip pain and secondary fall at home resulting in right surgical neck fracture of the femur."<sup>5</sup> The doctor went on to say:

The essential question is whether a symptomatic but subclinical fracture of the surgical neck of the right femur was present from the time of the Oct. 6, 2011 work incident. It is possible that this was present based on his consistent history and some documentation present including the ER notes of October 22 and Nov. 17 and the Nov. 10, 2011 office note of Dr. Koehn who actually suspected a fracture could be present. However, it can not be said within a reasonable degree of medical probability that a subclinical and undiagnosed fracture of the right femoral neck was definitively present throughout the 6 week period in question up to the time of the Nov. 19, 2011 fall at home. For this reason it does not appear that a work-related etiology can be found for the fracture and its subsequent treatment and any residual symptoms continuing to the present time. . . .<sup>6</sup>

ALJ Klein's October 15, 2013, preliminary hearing Order found claimant's right femoral neck fracture arose out of and in the course of his employment with respondent and stated:

Inherent in the question posed by the court was its previous determination that the claimant sustained a personal injury by accident, arising out of and in the course of his employment on October 6, 2011. The court found that as a result of that accident, the claimant got a splinter in his knee that became infected. The court further finds that the infection, caused by the original accident caused the fall at home on November 19, 2011.

Dr. Hufford stated in his report that it could not be said within a reasonable degree of medical probability that a subclinical and undiagnosed fracture of the right femoral [*sic*] neck was definitively present throughout the six week period in question up to the time of the November 19, 2011 fall at home. This statement from Dr. Hufford does not directly address the question asked by the court, but an answer can be inferred. The court interprets this statement by Dr. Hufford [*sic*] to mean that the claimant's need for right hip surgery did not pre-exist the November 19, 2011 fall. This means that the November 19<sup>th</sup> fall, which the court has already determined was a natural and probable consequence of claimant's original injury of May [*sic*] 6, 2011, is the prevailing factor in the claimant's need for treatment of the right hip. It is clear that Dr. Hufford did not understand that the court had already related a ["work related etiology" to the claimant's fall at home on November 19<sup>th</sup>.<sup>7</sup>

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> ALJ Order (Oct. 15, 2013) at 1-2.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 2011 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) provides:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant contends his November 19, 2011, fall at home was caused by his work-related knee injury. His right leg gave out, which in turn caused the fall. The next day, claimant went to the hospital by ambulance and underwent right hip surgery by Dr. Pollock to repair a right femoral neck fracture. Dr. Norman Koehn, claimant's personal physician, indicated claimant's October 6, 2011, fall at work was the prevailing factor causing his right lower extremity injury, including the right femoral neck fracture. The foregoing is sufficient to establish that claimant's right knee injury at work was the prevailing factor causing claimant's fall at home and his right femoral neck fracture.

Dr. Hufford's statement that it could not be said within a reasonable degree of medical probability that a subclinical and undiagnosed right femoral neck fracture was definitively present throughout the six-week period in question up to the time of the November 19, 2011, fall at home further bolsters claimant's argument that his fall at home was the prevailing factor causing his need for hip surgery. This Board Member finds claimant sustained the right femoral neck fracture by accident arising out of and in the course of his employment with respondent. Therefore, this Board Member affirms ALJ Klein's October 15, 2013, preliminary hearing Order.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>9</sup>

**WHEREFORE**, the undersigned Board Member affirms the October 15, 2013, preliminary hearing Order entered by ALJ Klein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant  
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Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier  
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Honorable Thomas Klein, Administrative Law Judge

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<sup>8</sup> K.S.A. 2012 Supp. 44-534a.

<sup>9</sup> K.S.A. 2012 Supp. 44-555c(k).